United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

20,053

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROBERT R. HAMILTON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	Civil Action 2154-65

261

Washington, D. C.

January 28 and February 4, 1966.

TRANSCRIPT OF PROCEEDINGS

Pages: 1 - 58

Prepared for: Court.

RAYMOND B. ALEXANDER
Official Court Reporter
Room 4822-A, U. S. Court House
Washington 1, D. C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROBERT R. HAMILTON,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Civil Action 2154-65
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
	:	
- - - - - - - - - - - - - - - - - -	-x	

Washington, D. C.

January 28, 1966.

The above-entitled matter came on for a motion before the HONORABLE EDWARD M. CURRAN, United States District Judge, commencing at 10:00 a.m.

APPEARANCES:

On behalf of the Petitioner:

JOHN BRILEY, ESQ.,

On behalf of the Respondent:

EARL J. SILBERT, ESQ.,
Assistant United States Attorney

- - o - -

I N D E X

P R O C E E D I N G S

THE DEPUTY CLERK: The United States of America versus Robert R. Hamilton, Civil Action 2154-65. Mr. Silbert and Mr. Briley.

MR. BRILEY: If the Court please, I have examined the records at St. Elizabeths Hospital and I find no basis in them to challenge the conclusion of the doctors at St. Elizabeths Hospital that this petitioner was competent at the time he entered his plea.

However, I would like to point out to the court that there is evidence in those records that the defendant was in a state of acute withdrawal following his surrender in this court on May 4. I submit to the court there is a question of whether or not the defendant was competent to assist in his hearing on May 7 before Judge Matthews.

THE COURT: Before Judge Matthews?

MR. BRILEY: Yes, sir. There are two criminal jackets, Cases 173-65 and 255-65.

THE COURT: He plead guilty before this court?

MR. BRILEY: That is right.

THE COURT: And there was the st atement that his attorney advised him if he plead guilty, he would receive no more than three or four years, and he received two to six years. What is your position this morning?

MR. BRILEY: There is a possible question as to his competency at the time.

THE COURT: What evidence do you have that he was?

MR. BRILEY: From the records of St. Elizabeths Hospital. That was three days prior to the hearing.

THE COURT: What evidence do you wish to get? Are you going to put on evidence today?

MR. BRILEY: I am not prepared to put on evidence today.

THE COURT: What am I going to do?

MR. BRILEY: I will ask the court to continue the case for one week.

MR. SILBERT: I have Dr. Platkin who is prepared to testify that this man was competent to testify at the conference.

THE COURT: That is your doctor, but I can't stop counsel for the defendant in calling any doctor he wants to call.

MR. SILBERT: I will agree to that. This matter was since set down for hearing.

THE COURT: I will give you one week to get your doctor in here. It is continued to February 4.

MR. BRILEY: Thank you, Your Honor.

(Adjournment.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROBERT R. HAMILTON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	Civil Action 2154-65

Washington, D. C.

February 4, 1966.

The above-entitled matter came on for a motion before the HONORABLE EDWARD M. CURRAN, United States District Judge, commencing at 10:00 a.m.

APPEARANCES:

On behalf of the Petitioner:

JOHN BRILEY, ESQ.,

On behalf of the Respondent:

EARL J. SILBERT, ESQ.,
Assistant United States Attorney

- - o - -

P R O C E E D I N G S

THE COURT: What is the motion? Is it for a transcript at government expense?

MR. BRILEY: Yes, Your Honor.

THE COURT: All right. Go ahead.

MR. BRILEY: There are actually two matters pending before Your Honor in this matter. I will explain it to you. One motion and the one argument is that the defendant surrendered on May 4. He was under the influence of narcotics and he went through a withdrawal within the next few days. The defendant is prepared to testify as to his experience during the withdrawal and his recollection of the hearing and the motion to suppress. Dr. Weickhardt is prepared to testify that based on his contact with the defendant at St. Elizabeths during the previous examination, plus what he hears in the courtroom today, he will be able to give an opinion as to whether or not --

THE COURT: What motion is before me?

MR. BRILEY: It is a 2255 motion which is still pending and the supplementary motion for a transcript at government expense. I think the outcome of the testimony, in the opinion of the psychiatrist, as to whether or not Hamilton was competent and the final motion to suppress will influence the decision on whether or not the defendant is entitled to a trans-

cript of the preliminary hearing.

THE COURT: You are filing a 2255 in order to withdraw the plea of guilty, is that it?

MR. BRILEY: In effect, yes, Your Honor.

THE COURT: All right. Go ahead.

MR. BRILEY: May I call the defendant to testify?

THE COURT: Yes.

Thereupon:

ROBERT R. HAMILTON

the petitioner herein, was called to testify in his own behalf and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRILEY:

Q Will you state your full name, please?

A Robert R. Hamilton.

Q On May 3, 1965, where were you living?

A At 19 Gallatin Street, N.E., Washington, D. C.

Q Now, at that time, were you addicted to the use of narcotics?

A I was.

Q At what period in your life did you first start to use narcotics?

A In 1960.

Q How long have you been addicted to narcotics?

A Off and on for the past five years.

Q Now, were you in custody during the early part of 1965?

A I was.

Q When did you become released?

A On January 20, 1965, I was released on bond and in March, but I don't remember the date.

Q At the time you were released on bond, were you addicted to the use of narcotics -- at the time you secured your release on bond in March, 1965?

A I had gone through withdrawal from the D. C. Jail, and I became addicted when I was on bond.

THE COURT: Were you under the influence of narcotics when you entered your plea?

THE WITNESS: I was going through a withdrawal.

THE COURT: You knew what you were doing, didn't you?

THE WITNESS: I was in such a state of mind, Your Honor, I was going through a withdrawal and vomiting, and my body was in such a state of mind that I was sick, and I didn't want to stay in the jail because I wanted to get some treatment for the withdrawal.

THE COURT: When you appeared before Judge Hart, he asked you a series of questions, didn't he?

THE WITNESS: I don't remember talking to him, Your Honor.

THE COURT: When you appeared before Judge Hart, you had retained counsel, did you not, Mr. Garber?

THE WITNESS: Yes, Your Honor. He was my lawyer before that.

THE COURT: I know. But when you entered the plea, you were asked certain questions, weren't you?

THE WITNESS: When I appeared before Judge Hart, he, he voided my bond and I surrendered.

THE COURT: Didn't you plead guilty before Judge Matthews for violation of the National Narcotics Act?

THE WITNESS: I pleaded guilty before you, Your Honor.

THE COURT: Before me?

MR. BRILEY: On May 19, Your Honor.

THE COURT: You were asked certain questions before me, weren't you?

THE WITNESS: Yes, sir.

THE COURT: And you answered them, didn't you?

THE WITNESS: Yes, sir.

THE COURT: And you knew what you were doing, didn't you?

THE WITNESS: Well, Your Honor, the reason I answered these questions, when I was in the bullpen, in the back, I

told Mr. Garber that I would plead guilty -- he asked me if I would plead guilty before you. He told me that you didn't want to try my case and you would accept my guilty plea. I told him I didn't want to plead guilty because I felt that I would get too much time. He told me you were a fair judge and he had talked to you, and he didn't think I would get much time and to plead guilty.

THE COURT: Didn't they send you to Lexington?

THE WITNESS: No, Your Honor. I went to Lorton Reformatory as that is where I was sent.

THE COURT: This Court recommended Lexington, didn't they?

THE WITNESS: Yes, Your Honor. They overlooked the Court's recommendation, and everybody else that came before you that day got recommended and went to Lexington.

THE COURT: When you appeared before me, you were asked: Have you been advised and do you understand in each of these cases, you have the right to a speedy trial by jury and with the aid of counsel? And you answered "Yes, sir."

THE WITNESS: The reason was that I wanted to plead guilty, Your Honor.

THE COURT: Then you were asked: Do you understand that you have no such right in your plea of guilty to the charge? And you answered, "Yes, sir, I do." Then you were

asked: Do you understand thatyou will have the assistance of counsel at the time of sentence if your plea of guilty is accepted? And you answered, "Yes."

You were asked: Do you understand in Criminal Case 255-65, you are pleading guilty to Count One of the indictment which charges that you purchased a narcotic drug not in or from the original stamped package, and did you commit that crime? You answered, "Yes, sir," didn't you?

THE WITNESS: Yes, Your Honor, with the promises that were made to me.

THE COURT: What promises?

THE WITNESS: That I would receive the treatment I wanted.

THE COURT: Who made you promises?

THE WITNESS: Mr. Garber told me.

THE COURT: What did he say?

THE WITNESS: He said I could go to Lexington, Kentucky and get the treatment I wanted.

THE COURT: Of course you could go. The Court recommended Lexington.

THE WITNESS: I didn't go, though. I got a letter saying that I would have to serve my time at Lorton.

THE COURT: You were also asked: Do you also understand in a criminal case No. 173-65 that you are charged with

carrying a dangerous weapon and that you are pleading guilty that you committed that crime? And you answered, "Yes, sir." (Reading) "Has your plea of guilty been induced by any promise by anyone as to what sentence will be imposed by the Court?" Your answer is "No, sir." "Have you been threatened or coerced by anyone in entering a plea of guilty?" You answered, "No, sir." "Have any promises of any kind been made to you by anyone to induce a plea of guilty?" You answered, "No, sir." "Do you understand the consequences of entering a plea of guilty?" The answer is "Yes, sir." "Are you entering a plea of guilty voluntarily and of your own free will because you are guilty and for no other reason?" "Yes, sir." "Have you discussed your plea fully with your attorney?" "Yes, sir." "Are you completely satisfied with the services of your attorney?" "Yes, sir." And then you entered your plea.

THE WITNESS: I have answered all of those questions about my attorney there?

THE COURT: Yes, you did. They are here in the record.

THE WITNESS: I was made promises. I wouldn't come before you and say that I wasn't made these promises.

THE COURT: Did you purchase the narcotic drugs not in or from the original stamped package that you say you did?

THE WITNESS: No, Your Honor, I didn't say that I

purchased.

THE COURT: Did you have drugs on you when you were arrested?

THE WITNESS: They were found in the automobile.

THE COURT: Whose automobile?

THE WITNESS: It was not mine.

THE COURT: Were you in it?

THE WITNESS: I was a passenger in the automobile.

THE COURT: Go ahead.

BY MR. BRILEY:

Q What was the specific date in March, 1965 that you were released?

A I don't remember.

Q How many weeks was it between that release and your surrender to the court on May 4, 1965?

A Five weeks.

Q During that five weeks, did you return, in addition, to the use of narcotics?

A I did.

Q And what narcotics were you using during that period?

A A mixture of heroin, morphine and cocaine.

Q Can you tell the court approximately how much you were using per day or per week?

A I would say about $40.00 a day.

Q And how many hours would it be that you could go without the use of drugs in between shots?

A Five or six hours.

Q On the night of May 3, May 4, 1965, did you use narcotics?

A I did.

Q Will you describe to the court approximately how much you did use during the 24 hours before you appeared in court on May 4?

A I can't give you the exact amount of the various ones I used that night, or that morning before I came to court.

Q Do you remember what narcotics you used?

A Yes.

Q What narcotics were they?

A Morphine, methadone and cocaine.

Q How many shots of each did you take during the 24-hour period prior to your appearance in court on May 4?

A I can't describe how many.

Q Can you give any approximation?

A Just within 24 hours before I came to court that morning?

Q Yes.

A Six, seven, or eight.

Q Total?

A Total.

Q Do you happen to know what strength each of these narcotics possessed at that time?

A I know the morphine was a half grain and grain tablets, and some of it was one-sixteenth of a grain.

Q What was your condition when you appeared in this courthouse on May 4?

A I don't remember.

Q Do you remember anything of what happened in this courthouse on May 4, 1965?

A I remember sitting in the courtroom hallway. My mother brought me to court in a taxicab, she told me. I don't remember coming in a taxicab. When I came to the courtroom, I was sitting in a chair in front of Judge McGuire's courtroom, and the Marshal brought me before Judge Hart at the request of the bondsman, and he asked me what was wrong, and I don't remember what I said to him. I just know the bondsman told me I was not fit to be in the street, and they surrendered my bond.

Q Where were you then taken?

A The Marshal took my downstairs and put me in the bullpen by myself.

Q Do you have a good recollection of what happened in the cellblock?

A I remember Mr. Robinson came back and he told me I would get back on bond in two weeks after I got myself straightened up.

Q Do you know what time of the morning that was? Or the time of day?

A No, sir.

Q Do you know what time of the day it was that you were removed on to the jail?

A No, sir.

Q What was your next recollection after you got to jail?

A I remember speaking to some people in the jail when I first went there, but exactly what about, I don't know, as I was in the cell. The next morning, I woke up and I started feeling bad, and everybody was going to eat breakfast there, but I couldn't go out to eat as I was going through withdrawal symptoms.

Q Will you describe to the court the symptoms you experienced on May 5?

A I started sweating and vomiting because I hadn't eaten anything.

Q Did you eat anything at all on May 5?

A No, sir.

Q Did you have anything to eat on May 6?

A I tried to drink a cup of tea and some coffee. I

drank a little liquid, but that's all, and nothing to eat.

Q Did you have anything to eat on May 7 before you appeared in court for the motion to suppress?

A No, sir.

Q At what point did your trying to eat cease, if you recall?

A If I tried to eat, I would vomit, but it would stop a day later or two days later.

Q Two days later than what? Your surrender?

A About the 6th of May.

Q Do you recall when you were first able to retain food after May 4? What day was it?

A When I came up here after I had my motion to suppress, I went back and I really didn't eat then until about three or four days later.

Q Did you have any other symptoms during that time you have not referred to?

A Sweating and vomiting, and other than that, I had a fever and chills. I had a contact of diarrhea.

Q Do you recall when the sweating and the chills ceased?

A Approximately five, six or eight hours after I surrendered.

Q Do you recall when the diarrhea ceased?

A About the same time, I guess.

Q Did you make a request to enter the jail hospital?

A Not at that time, because the first time I went there, they strapped me to a bed and I had a treatment of what they called "cold turkey," so I just layed in the cell, myself. I went to see the doctor and he ordered some belladonna be sent to me. I think it was belladonna.

Q Do you recall being in this courthouse on May 7 for a motion to suppress?

A Yes, I can remember that.

Q Will you describe to the court your condition as you recall it on that day?

MR. SILBERT: Your Honor, at this point, I am going to object to that. It is the contention of the government whether or not this man was competent at the time of his motion to suppress has no relevance or materiality to whether he was competent to enter his plea of guilty. His conviction rests upon a plea of guilty, and he may withdraw it if it was involuntary without entering into that understanding, or he was incompetent at that time.

THE COURT: I think so. That has nothing to do with the motion to suppress. I am going to have to decide whether I am going to allow him to withdraw his plea.

MR. BRILEY: Well, if the Court please, in a case

such as this, the motion to suppress --

THE COURT: That hasn't anything to do with it.

MR. BRILEY: May I be heard for one moment?

THE COURT: No, because if I allow him to withdraw his plea, you can renew your motion to suppress.

MR. BRILEY: That is true, Your Honor, but this would be a basis for changing his plea.

THE COURT: I am not going to pass on a motion to suppress evidence on a plea of guilty stand. What kind of law is that?

MR. BRILEY: I would like to point out to the Court in a case, such as this, the motion to suppress is almost in the trial of the case, and if a man was not competent for trial, then he would be allowed --

THE COURT: -- I am not going to try this case, and I am not going to rule on any motion to suppress if the plea of guilty stands.

MR. BRILEY: Yes, but if this defendant entered his plea of guilty, having lost his motion to suppress, and --

THE COURT: I can't help that.

MR. BRILEY: With that proceeding and if it were not valid because the defendant --

THE COURT: -- I don't care what it is. If the plea of guilty stands, it doesn't make any difference about

the motion to suppress. If the plea of guilty doesn't stand, then you can renew your motion to suppress, but I am not going to pass on it now.

MR. BRILEY: That is true, Your Honor. When we were here last week, Your Honor, and I acknowledged to the Court in my reading of the record at Saint Elizabeth's and the reports there, they do not indicate there is any foundation to challenge the finding of competency by the doctors at the time of his plea. That did indicate that there was some evidence in there that this man may not have been competent during his motion to suppress.

THE COURT: I am not interested in the motion to suppress.

MR. BRILEY: Very well, Your Honor.

BY MR. BRILEY:

Q Following your motion to suppress and the denial, thereof, by Judge Matthews, did you discuss the taking of an appeal, or preserving this point for appeal with Mr. Garber?

A I thought I was going to fight the case in court.

Q Did Mr. Garber give you any opinion as to whether or not that motion to suppress, denied by Judge McGarraghy, might be overruled by the Court of Appeals?

MR. SILBERT: I want to object, Your Honor. That is not material as to whether or not the plea was voluntarily

entered, or with understanding.

THE COURT: Sustained. I don't think so. Did Mr. Garber promise you anything?

THE WITNESS: Only that I would receive treatment if I went.

THE COURT: Did he say how much time you would receive?

THE WITNESS: He said I would not be given any more than three or four years.

THE COURT: He told you that you would not get over three or four years?

THE WITNESS: He said he didn't think I would get more than three or four years.

THE COURT: You have two to six years, and you don't like it.

THE WITNESS: Not only that, Your Honor, but I didn't get any treatment. I haven't received any treatment that was promised me.

THE COURT: Well, that is not my fault. I wanted you to get treatment.

THE WITNESS: I realize that, Your Honor, but probably these people overlooked your recommendation, Your Honor.

THE COURT: I don't know, but they do it, don't they? Go ahead.

BY MR. BRILEY:

Q Mr. Hamilton, were there any other representations made to you prior to the pleading that induced you to plead?

A Well, the only other thing that was said to me by Mr. Garber was that I was going before Judge Walsh, or Judge Keech, or somebody -- I don't remember who the Judge was that was trying my case -- and he said, Your Honor, that you didn't think I could beat my case, or something.

THE COURT: I told Garber that you couldn't beat your case?

THE WITNESS: Not necessarily, but that you said that you didn't see how I had any points of the law, or something. I just can't remember it that well.

THE COURT: Go ahead.

MR. BRILEY: Did you finish? I don't believe he has finished his explanation to the last question.

THE WITNESS: He said that Judge Curran was a fair man, and he didn't think I would get as much time, and he said that I would get treatment.

BY MR. BRILEY:

Q What was the primary reason that you pleaded guilty?

A To receive treatment.

MR. BRILEY: I have no further questions.

MR. SILBERT: I have just a few.

CROSS-EXAMINATION

BY MR. SILBERT:

Q Isn't it a fact, Mr. Hamilton, that Mr. Garber told you on the day of trial, the date your case was set for trial, that he was ready to go to trial? Didn't he tell you that?

A No, he did not.

Q Isn't it a fact, Mr. Hamilton, that you were scheduled to go and your case was assigned to Judge Keech? Isn't that a fact?

A I don't remember what judge it was.

Q And isn't it a fact, Mr. Hamilton, in view of your bad record, you were afraid if you were found guilty by a jury, you might get a three to nine-year sentence?

A Oh, no. You can't put that in my mouth. I didn't know how much time I would receive if my case was tried by a jury.

Q Isn't it a fact that because of your fear of a longer sentence from a jury conviction, you decided to enter a plea of guilty so that you could get the best deal you could?

A No, it is not a fact.

Q Mr. Hamilton, you had been in jail back in January, hadn't you?

A Yes, sir.

Q And you had gone to the hospital, and at that time, the jail hospital, because you were suffering with narcotic

withdrawals, is that correct?

A That's correct.

Q And yet you testified before this court today that on May 4 you were suffering from narcotic withdrawals, and yet you never went to the jail hospital to receive any kind of medicine there?

A Going there for what? You don't receive any treatment at the District Jail Hospital. I was strapped to a bed and I never received any medical treatment.

Q Just a short time after you were sentenced, isn't it a fact that you even went to the hospital for a cold and because you had a cold, you went there?

A No, it is not a fact. You don't go to the hospital for a cold. The doctor comes to see you.

Q But you asked for treatment for a cold, though, didn't you?

A When was this?

Q In June, about two or three weeks after you entered your plea of guilty, you asked for treatment for a cold, isn't that correct?

A This is correct.

Q And you did it several times, as a matter of fact?

A I might have had a cold. I don't know what it might have been.

Q Now, sir, when you were here in court on May 19, are you telling His Honor that you did not understand the questions that were posed to you by this court? Are you telling him that?

A Did I understand the question?

Q Yes. The Judge just read to you certain questions today. Do you remember him reading that to you today -- those questions?

A At the time I pleaded guilty?

Q That's right.

A I remember coming to the courtroom. I remember that.

Q And do you remember the Court Clerk asking you certain questions?

A Not all of the questions His Honor read a few minutes ago.

Q You don't even remember that?

A I remember some of them, yes, but not all of them.

Q Are you saying to this Court that on fifteen days after you had been in jail, you were still going through narcotic withdrawals? Are you telling His Honor that?

A I had been through withdrawals, but I still couldn't see well and I will still sick, and I couldn't sleep.

Q I am asking you if you understand the question. Were those withdrawals such, on May 19, that you could not un-

derstand the questions that were asked you?

A I am just telling you that I don't remember all of the questions that were asked me in the courtroom. Other than that, I was afraid, and that is why I didn't pay that much attention to it.

MR. SILBERT: I have no further questions, Your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

MR. BRILEY: If the Court please, I have subpoenaed Dr. Weickhardt to testify with respect to the competency of this defendant as of May 7, but Your Honor apparently ruled that that matteris not a proper matter to be raised before you.

THE COURT: No. You can raise the motion to file if I withdraw the plea. Is that all you have?

MR. BRILEY: Yes, Your Honor, except with respect to the question of competency, I would like to call the Court's attention to the decisions of the Court of Appeals.

THE COURT: Competency has nothing to do with the motion to suppress. That is a legal matter.

MR. BRILEY: That's right, Your Honor. I thought we had passed by that matter, that is, on the motion to suppress.

THE COURT: I thought you were going to raise it again.

MR. BRILEY: Well, I wanted to, while the doctor was here, I wanted to point out to the Court that in the decision of Holloway, the Court of Appeals indicated that the judge might be required to make inquiry as to the basis of that decision and should not accept the letter of the Court. Now, I have no objection to the finding of competency, but I wanted to point that out to the Court.

THE COURT: All right.

MR. SILBERT: I have the doctor here.

THE COURT: I don't need that because I haven't ruled upon your 2255.

MR. BRILEY: In that event, Your Honor, I would like to argue the motion for a transcript at government expense.

THE COURT: You will need it if I allow the plea to be withdrawn? Right? Now, what do you want to argue? If the plea stands, you don't get it, and if the plea is allowed to be withdrawn, you will get it.

MR. BRILEY: That's right, Your Honor.

THE COURT: All right. Now, what do you want to argue?

MR. BRILEY: Well, I would argue that the result of that motion to suppress might, on review, in comparing what transpired in the motion to suppress, the decision of the United States Supreme Court in the case of Beck vs. The State

of Ohio and where the Court of Appeals says that when the constitutional validity and arrest is challenged, the burden is on the government to prove the reliability of the informant in a case where the informant is involved.

Now, based on the findings of fact that is in the file in Case 255-65, which Judge Matthews entered, there is no indication that the government produced any evidence, or even identified the informant.

THE COURT: I don't know. What Judge Matthews did, that is up to her.

MR. BRILEY: I submit to the Court that having lost the motion to suppress, if this petitioner was misadvised of the law on the motion to suppress, then he would be induced, on that basis, to enter his plea of guilty.

THE COURT: You mean he was misadvised? I suppose Mr. Garber did that, too, huh? Did Mr. Garber misadvise him as to the law? Is that what you are insinuating?

MR. BRILEY: Yes, Your Honor.

THE COURT: Can you prove it?

MR. BRILEY: Well, Your Honor, I --

THE COURT: It is a pretty serious thing for one lawyer to accuse another, isn't it?

MR. BRILEY: Yes, it is, Your Honor.

THE COURT: Well, can you prove it?

MR. BRILEY: Your Honor, I don't know whether I can prove it unless I can see the transcript to see which cases were argued.

THE COURT: Then, why do you make it?

MR. BRILEY: In support of my motion for a transcript, Your Honor.

THE COURT: You make it and you don't know it?

MR. BRILEY: If the Court please, in paragraph 10 of my motion, I observed that I cannot advise the petitioner whether or not there is support for his claim of ineffective counsel.

THE COURT: You have just made a statement which, in my judgment, is a very serious one.

MR. BRILEY: I agree with you.

THE COURT: And now you don't know whether you can prove it. I am giving you some advice. As a lawyer, don't make statements that you are not ready to prove.

MR. BRILEY: Well, Your Honor, in support of the motion to see the transcript, I say this is a possibility.

THE COURT: You can't be questioning possibility. You don't rule on possibility. Cases are not tried on possibility.

MR. BRILEY: Well, Your Honor, if a man has a motion to suppress and his motion is overruled, then he has to weigh

the possibility of reversal by the Court of Appeals against the possibility of a lighter sentence and based on entering a plea instead of standing trial. This is a basic decision when a man pleads guilty.

THE COURT: I know. I am very familiar with that.

Do you have anything else?

MR. BRILEY: No, Your Honor. That is the basis of my motion for a transcript.

MR. SILBERT: If Your Honor please, for the reasons that we set forth in our answer to the motion for a request of the transcript, we oppose that, based on the fact that we don't think it has anything to do with this 2255.

With respect to the withdrawal of his plea of guilty, I do have some witnesses here with respect to his competency, and if Your Honor will permit, I would like to call them to the stand.

THE COURT: Very well.

MR. SILBERT: Thank you, Your Honor.

Dr. Weickhardt, please?

Thereupon:

GEORGE WEICKHARDT

was called as a witness on behalf of the respondent, and having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. SILBERT:

Q Will you please state your full name?

A George Weickhardt. W-e-i-c-k-h-a-r-d-t.

Q And what is your occupation or profession, sir?

A I am a physician on the Staff of St. Elizabeth's Hospital.

Q And what is your field of specialty, if any?

A Neurology and psychiatry.

MR. SILBERT: Your Honor, counsel for the petitioner has informed me he will stipulate as to the doctor's qualifications as an expert in the field of psychiatry.

MR. BRILEY: I am, Your Honor.

BY MR. SILBERT:

Q Doctor, in the course of your duties at St. Elizabeth's Hospital, did there come a time when you participated in the examination of Robert R. Hamilton, who sits here in court today at counsel's table, to determine whether or not he was competent as of May 19, of last year, that is, 1965?

A Yes.

Q And, sir, as a result of your participation in that examination, did you arrive at a conclusion as to his competency?

A Yes. We arrived at the conclusion that he was com-

petent on May 19, 1965.

Q And, sir, can you briefly explain to the court on what tests and on what information you relied in arriving at that opinion or conclusion?

THE COURT: I thought you made no contest about his competency.

MR. BRILEY: That's right, Your Honor, but I feel, as I pointed out to the court, under the decision of Holloway, I think the court may very well have the duty, even without objection, to inquire into the basis of that.

THE COURT: You already have a report here from St. Elizabeth's.

MR. BRILEY: Your Honor, the report is only a one-page letter in which the Court of Appeals said in the Holloway case was inadequate.

THE COURT: All right. Go ahead.

BY MR. SILBERT:

Q Would you answer my question, Doctor? What kind of tests did you and the other doctors at St. Elizabeth's Hospital rely in arriving at your conclusions that this petitioner was competent on May 19, 1965?

A We had Mr. Hamilton under our observation for a period of several weeks. The formal examination was on December 28, 1965. At that time, we inquired into Mr. Hamilton's be-

havior, his thinking, and his emotional state. As far as his emotional state was concerned, we found no evidence of depression or elation. We found that his thinking was clear; that his memory was intact, although there had been some unusual behavior while he was in the hospital at the formal examination when his behavior was quite appropriate.

It was our conclusion that Mr. Hamilton had no mental disorder. We inquired into the question of what effect his drug addiction might have had on his mental state on May 19, 1965, and in response to our questions, Mr. Hamilton indicated that he had passed through the acute phase of the abstinence symptoms prior to that day.

We, therefore, concluded that his use of drugs prior to that date had really no particular injurious effect on his mental ability on that particular date.

Q Let me ask you this, sir: Assuming, or taking as a fact that he was under the influence of narcotics on May 4, 1965, and that his bondsman surrendered him for that reason, and the surrender was accepted by a judge of this court.

In your opinion as a psychiatrist, what would be the effect of his being under the influence on May 4, 1965 of narcotics -- what would be the effect of that on his ability to understand the nature of the proceedings and to communicate with counsel on May 19, 1965, if you further assume that be-

tween May 4 and May 19, he had no further narcotics?

A I think I should point out at the time of our formal examination of Mr. Hamilton, we gave that question no consideration because that question had not been asked of us. We merely determined his competency on May 19, 1965.

Now, you are asking me on the basis of what I have subsequently learned to say something about his mental condition on --

Q -- The same date, Doctor, May 19.

A On May 19.

Q The same date, but I am asking you to assume as a fact that he was under the influence of narcotics on May 4, and had no narcotics since that date, and a period of 15 days had elapsed. I am asking you, in your opinion, and what you know of this patient, would that one effect, if any, would that fact have on his ability to understand the proceedings on May 19 and to communicate with counsel on that date?

A I would say no effect.

Q And on what do you base that opinion?

THE COURT: Because he had no drugs for fifteen days, I guess.

MR. SILBERT: I assume. I just want that on the record, if that is the case.

THE WITNESS: That, plus the fact that we found no

evidence of mental disorder at thetime of our examination.

MR. SILBERT: You may inquire. That completes our direct examination.

CROSS-EXAMINATION

BY MR. BRILEY:

Q Dr. Weichhardt, do you recognize drug addiction as a mental illness?

A Drug addiction is encountered frequently in patients who have some underlying mental illness. I do not believe that drug addiction, itself, is a mental illness.

Q Now, drug addiction, coupled with any other factors, was ever considered a mental illness?

A Yes.

Q Are there any factors in Mr. Hamilton's background, when coupled with drug addiction, would project to a mental illness?

A No.

Q Isn't it a fact that your examination and consideration of Mr. Hamilton's case was one that went strictly to the question of competency on May 19, and you did not inquire -- your inquiries were not directed to him concerning whether or not he had had any mental illness?

A We certainly inquired into the question of mental illness. This is something that we do, regardless of whether

we are asked or not.

Q Is it your testimony that there is no evidence of a mental illness in Mr. Hamilton's background?

A That is my conclusion, yes.

Q You testified that there was some -- I believe your words were "strange behavior" during his confinement?

A Would you like me to explain that?

Q Yes.

A This was on November 19, 1965. There was another patient on the ward with Mr. Hamilton who became rather talkative and upset, and this, evidently, upset Mr. Hamilton to the point where he decided to put a stop to the patient's talkativeness, and it was reported to me that he did so by striking the other patient about the face and head.

When I learned this, I ordered Mr. Hamilton to be transferred to another ward because we do not tolerate behavior of that sort on that particular ward.

I got a message that he wanted to see me first, and he was not going unless he saw me first. I declined to see him first, and ordered that he should be moved, anyway.

He then resisted the attempts of the nursing assistants to remove him from that ward. Several other patients came to his assistance and, as a result, we had a small riot in which three of our employees were injured.

Mr. Hamilton put up a terrific fight. I arrived on the ward at that time and I can say, of my own knowledge, it took eight or nine men to remove Mr. Hamilton from that ward.

I saw him a little later that day and he was in a stupor. He was very tremulous. He would not respond to my questions. He seemed quite apprehensive. His pulse rate was extremely fast.

The next morning, it was reported to me -- I did not examine him, myself, the next morning -- but the next morning, which was approximately twelve hours later, that this had all cleared up.

And it was my conclusion, in retrospect, that this was simply a state of exhaustion and emotional upset from having gone through this experience; that it was very transitory, and that this did not constitute, in itself, evidence of a mental illness.

Q Was it not determined that his reaction to this incident was a genuine reaction?

A I think it was a genuine reaction. He was exhausted and he was upset.

Q Could that reaction be described as a catatonic reaction?

A We thought, at the moment, that it might be a catatonic reaction, but there were several things that suggested

it was not. First of all, he had a very rapid pulse which is not characteristic of a catatonic stupor and, furthermore, it was so brief that it cannot be described now as a genuine catatonic stupor. I would say its brevity and the fact that it was accompanied by evidence of physical exhaustion points to the conclusion that it was not a catatonic stupor.

Q And it is your opinion now that, in itself, or coupled with any other factors in Mr. Hamilton's background and was within your knowledge, there is not any evidence of mental illness?

A That was my conclusion.

Q With respect to the use of narcotics, Doctor, is it your testimony that a lapse of fifteen days between the use of narcotics, or an absence of fifteen days from the use of narcotics would necessarily mean that a man would not be incompetent at the end of those fifteen days as a result of withdrawal?

A That, certainly, is not the only factor that I would take into consideration in arriving at an opinion as to a man's competency. But if this were the only factor to be considered, I would say that the fact he was taking drugs fifteen days prior would have no bearing on his competency.

Q Are you saying or are you not saying that a man will finish with withdrawal in fifteen days?

A Not necessarily. He will pass through the acute phases of withdrawal. The physical symptoms that go along with abstinence usually subside within a few days. In fifteen days, he still may not be feeling quite well. He may not have a good appetite. He may still be rundown, and he may still carve drugs very strongly, but unusual behavior, or unusual thinking due to the fact that he has had drugs fifteen days previously is not to be expected.

Q Would you say that an individual going through an acute withdrawal would be, necessarily, not competent to assist counsel?

A No. He would not necessarily be not competent to assist counsel.

Q So it is possible for one individual, as opposed to another individual who is incompetent, or some other person could still be going through a withdrawal and still be competent?

A Yes.

Q Assume that a person is incompetent at the time they are going through an acute withdrawal, at what point, after the acute withdrawal abates, would a man be restored to sufficient competency to participate in the conduct of his defense?

A I would say as soon as he becomes physically able

to appear in the courtroom.

Q Doctor, what is your opinion as to the onset of a withdrawal after the use of morphine?

A Well, the onset of the abstinence symptoms usually appear about the time of the next scheduled dose. If he is taking narcotics every six hours and he is used to taking narcotics every six hours, then the onset of these symptoms will be about six hours after the last dose.

Q And when would the peak be reached?

A Within a few days. Usually, within two or three days.

Q And following the peak, when would the individual begin to gradually abate from withdrawal, or when would the withdrawal begin to abate?

A Immediately after the peak.

Q Did your examination show any facts as to the condition of Robert Hamilton -- the physical condition of Robert Hamilton on May 19?

A I don't believe we could make any far-reaching statement about his physical condition on May 19, but we were really not asked to make a conclusion about that.

Q Did you ask Mr. Hamilton of his own recollection of his physical condition on May 19?

A Yes. I made a note about that. This is the note I made at the time. I will read it exactly as I have it: "Had

passed through acute withdrawal at time entered guilty plea in May, 1965, but was still not eating or sleeping well. Had been locked up for two weeks at that time."

Q Now, I believe you testified, in response to a question on direct examination, that you did not consider the background of narcotics when you made your findings as to the competency of Robert Hamilton?

A That we did not consider the facts?

Q Did I understand you correctly?

A I didn't intend to say that. If I did leave that impression, we certainly consider the background of narcotics addiction and the use of narcotics in arriving at our conclusion.

Q Did you investigate the possibility as to whether or not he might have been incompetent solely as a result of his experience from withdrawal?

A Yes, we did.

Q And your conclusion was that he had sufficiently recovered from withdrawal?

A Yes, it was.

Q Does your report indicate, or from your knowledge of the background and the facts in this case, can you give any opinion to the court as to what time between May 4 and May 19 this man achieved his competency?

A I have a little bit to base that on. We received a report from the D.C. Jail Hospital that in January, 1965, Mr. Hamilton was treated there for withdrawal symptoms between May 21, 1965 and May 24, 1965, a period of three days.

I would assume that he was kept in the hospital only as long as he had acute withdrawal symptoms, and I would also expect that the pattern of withdrawal would be similar on two occasions; that his use of drugs and his pattern of reacting to the drug and reacting to abstinence would be more or less similar on two occasions.

So I would say that sine he probably recovered from the acute withdrawal symptoms within three days on one occasion, he would recover from the acute withdrawal symptoms within three days on another occasion.

THE COURT: You say you got a call from the Jail when?

THE WITNESS: Let me find that. This is a letter from the District of Columbia Jail, dated November 18, 1965, in regard to Robert Hamilton.

THE COURT: You said May 21, 1965, before.

MR. BRILEY: Yes, I believe he did.

THE WITNESS: No. I said January.

THE COURT: You said on May 21, 1965, you heard from the District of Columbia Jail that he was having withdrawal

symptoms. What is the date that you heard?

THE WITNESS: January.

THE COURT: What is this November 18 date?

THE WITNESS: On November 18, he was in St. Elizabeth's Hospital.

THE COURT: What is the date that you got the letter from the Jail, advising you he had recovered or had gotten over his withdrawal symptoms within three days?

THE WITNESS: November 18, 1965.

MR. BRILEY: This letter from the Jail is in response to a letter of inquiry. Is that correct, Doctor?

THE WITNESS: Yes.

THE COURT: But it was not May 21, 1965?

THE WITNESS: No.

BY MR. BRILEY:

Q The dates that the jail referred to when Mr. Hamilton was going through a withdrawal are what dates?

A It says he was hospitalized in the D.C. Jail Hospital from January 21, 1965 to January 24, 1965, during which time he was treated for withdrawal symptoms from heroin addiction.

Q Is that period a three-day period, or four-day? Is that "through" or "to"?

A It says January 21 to January 24.

Q Now, does that indicate that Hamilton was hospitalized

for acute withdrawal?

A I would assume that.

Q Would that mean, in your opinion, his release on January 24 would be --

A -- That he, no longer, required hospital treatment.

Q Would it mean that he was necessarily competent to assist --

A -- Not necessarily, but it means to me that he was physically able to leave the hospital environment and, coupled with the fact that, later, we find no evidence of mental disorder, I would conclude that he was competent upon the release from a hospital.

Q Doctor, do you have any opinion as to what point the average person would regain competency following --

THE COURT: -- He has already answered that question. Let's not repeat it.

MR. BRILEY: May I have the Court's indulgence for just a moment?

THE COURT: I believe the answer was that he recovered after the acute withdrawal symptoms had ended, is that correct, Doctor?

THE WITNESS: Yes, sir.

BY MR. BRILEY:

Q Doctor, with respect to this one incident and the re-

action of Mr. Hamilton, did he receive any special treatment to assist his recovery from that state he was in?

A Yes, he did.

Q Will you describe?

A I ordered 100 milligrams of fluorescein to be given to him in the hospital. That was the only dose of fluorescein he received while he was in the hospital.

Q That was a one-time dose?

A A one-time dose, yes.

MR. BRILEY: Thank you, Doctor.

(Witness excused.)

MR. SILBERT: Your Honor, may I call Mr. Garber to the stand, please?

THE COURT: Yes.

Thereupon:

WILLIAM J. GARBER

was called as a witness on behalf of the respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SILBERT:

Q Will you please state your full name, sir?

A William J. Garber.

Q What is your occupation and profession?

A Attorney.

Q And for how long have you been a Member of the Bar?

A Approximately -- almost 13 years.

Q And during that time, sir, have you had occasion to represent defendants in criminal cases?

A Yes, I have.

Q Can you estimate the number?

A Oh, I would say it would be in the neighborhood of 2,000.

Q Now, sir, did you, in the course of your occupational duties, ever represent the petitioner in this case, Robert R. Hamilton?

A Yes, I have.

Q Did you represent him in proceedings that are at issue before this court, that is, Criminal Cases Nos. 173-65 and 255-65?

A That is correct.

Q And were you appointed or retained in that case?

A Retained.

Q Had you ever represented Mr. Hamilton before?

A Yes, I have.

Q Can you enumerate, briefly, the number of occasions?

THE COURT: I am not interested in what happened before.

BY MR. SILBERT:

Q But you have represented him before?

A That is correct.

Q And that was under a retained basis, too?

A That is correct.

Q Sir, did there come a time in this case when this petitioner entered a plea of guilty, within your recollection, to a one-count indictment, Criminal Case 173-65, and in a two-count indictment, Criminal Case 255-65?

A Yes.

Q Will you please briefly explain to the court the circumstances leading up to his entry of that plea?

A Well, as I recall, it was on the 19th of May and, as you pointed out, there were two indictments pending against him. One was a one-count indictment, charging him with carrying a deadly weapon. On May 19, the indictment involving the narcotics offense was scheduled for trial in this court.

Q Let me interrupt you at this point. Did that also include another count for carrying a deadly weapon after a conviction of the felony?

A Yes, it did.

Q So it was a two-count indictment?

A It was a three-count indictment, as I recall it. One count charged the purchase of a narcotic drug not in or

from the original stamped package. The second count was facilitating the concealment of the narcotic drug, and the third count of the indictment was the carrying of a deadly weapon. I haven't looked at the file for some time, but I believe it was a three-count indictment.

THE COURT: No. It was only a two-count indictment. There is nothing about the concealment of the narcotic drug.

THE WITNESS: Then I am in error, Your Honor.

BY MR. SILBERT:

Q Will you please relate what happened on May 19, as best you can recall now?

A The case was scheduled for trial. It was called in the Assignment Court that morning. Both sides announced "Ready." The defendant, at that time, was incarcerated and had been brought up from the jail, and there was also a man by the name of Donald Smith, who was in jail also, and who I had ordered up as a witness in the case.

The case remained in the "ready" status for some time. I was in the building and I was in touch with Mr. Greaver from time to time concerning when this case would go out.

I had talked to the defendant and the witness in the cellblock, downstairs, in the meantime, and in talking with Mr. Greaver, I was informed that this case would be the next

case to go out. I asked him which judge would be available, and he told me it would be probably be sent to Judge Keech for trial.

I went down to the cellblock and I talked to the defendant, and I told him that we were the next out and that my information was that it would probably go to Judge Keech. Then there was a discussion as to the disposition of the case.

I talked to Mr. Wall, who was the Assistant United States Attorney, handling the case and prosecution concerning disposition, and he indicated that the Government was willing to accept the plea to the first count of the indictment and, also, to the second indictment, charging the carrying of a deadly weapon. I communicated this to the defendant.

After some discussion, there was an arrangement made for him to accept the plea.

Q Now, sir, during the course of this discussion, I will have to ask you what was involved in that discussion?

A Well, without getting into the merits of the case as far as he was concerned, there was a discussion as to what the sentence would be. I informed him on the first count, the narcotics count, the original stamped package, which is commonly referred to as the "possession count," that for a person so possessing or transferring the narcotic, according to the statute, there was a penalty of from two to ten years. And I

explained to him that the court could give him and would determine the sentence.

I recall explaining to him the various possibilities; that he could get from eight months to two years, one to three, two to six, three to nine, or, in other words, up to the maximum.

Also, on the indictment charge, the charge on the CDW, the Government intended to file an information on prior convictions, and that carried, under the statute, a penalty up to ten years.

After it was agreed that the plea was accepted, I believe I came to Judge Curran's Chambers -- I don't know whether I talked to Judge Curran, personally, or to his secretary, but it was on the request of whether or not the Judge would be available to accept the plea, and I received word that he would.

So, arrangements were made to have the defendant brought up and to take the plea.

Q Well, sir, let me ask you this: Did you, at any time, make any promises to him as to what the sentence would be, or as imposed by Judge Curran?

A No. I told him that was up to the court. He was interested in getting to Lexington. I informed him that the court could recommend that he go to Lexington, and, also, I

would speak to his probation officer, Mr. Gallagher. In fact, I talked to Mr. Gallagher, and he indicated he would probably make a presentence report, and I informed the defendant I would do whatever I could to see that recommendations were made for him to go to Lexington.

Q Did you promise him that he would go to Lexington?

A No, sir.

Q Can you tell us what the attitude of the defendant was toward entering his plea of guilty, and, between that as opposed to going to trial that day?

A Well, in the morning when I first talked to him, he was ready for trial, and I prepared to go to trial with him. As far as entering a plea was concerned, I was satisfied with those proceedings, there was no involuntary choice.

Q Now, sir, you had have an opportunity to discuss it with him that day? Is that correct?

A That is correct.

Q Now, sir, in your opinion, was he able to communicate with you effectively on that day?

A Yes.

Q Did he, in your opinion, understand the charges that were placed against him on that day, May 19?

A I don't think there is any question about it. I explained it to him. I explained what the charges were, and I

explained to him what the possibilities were as far as the sentence is concerned. He was also concerned about the Youth Act sentence; under Title 18, Sec. 5010(b), and I had talked to Mr. Gallagher about that, and I informed the defendant the unexpired time under the Youth Act would run concurrently with whatever sentence he received from the court, here.

Q Did you ever talk to this client about going to St. Elizabeth's Hospital for a mental examination?

A He mentioned it to me once. On one time, he said, "Do you think I could go over to St. E's?" I asked him did he think there was anything wrong with him, and I don't recall whether I ever got a response. That was never pursued.

Q And that was the end of the discussion?

A To my recollection, that was the end of the discussion.

Q Did he ever ask you to send him over to St. E's and you refused to do so?

A No.

MR. SILBERT: That is all, Your Honor. Thank you.

CROSS-EXAMINATION

BY MR. BRILEY:

Q Mr. Garber, how many years has it been that you have been representing Robert Hamilton?

A I believe I first represented him back in 1961, if

I am not mistaken -- the latter part of '60 or '61. I am not quite sure.

Q And he had had previous difficulty concerning narcotics, didn't he?

A As far as the charge of narcotics is concerned, I am not certain as to whether he had a vagrancy charge against him, or not. I have not seen his record in some time, and I don't know.

Q Were you aware, in any event, that he had any personal problem with narcotics?

A That is going to get into an attorney-client privilege situation, Your Honor. I feel that I must decline to answer that on the ground of attorney-client privilege.

Q In any event, did you at any time during your representation of Mr. Hamilton recommend to him that he have a mental examination?

A I have no recollection of ever recommending that he have a mental examination, no.

Q As you have testified, you made no promises to Mr. Hamilton with respect to sentencing?

A That is correct.

Q And, of course, you have listened to his testimony which was given earlier this morning?

A That is correct.

Q Do you recall anything in the conversation between yourself and Mr. Hamilton that would lead him to believe that he would get a sentence from three to four years?

A No, sir, other than just telling him what the possibilities were as far as the sentence was concerned. In other words, I explained to him in colloquial language that by entering a plea to the original stamped package count, the CDW count, and carrying a deadly weapon count, that the court would have to give an indeterminant sentence with the minimum not to exceed no more than one-third of the maximum.

And I gave him the various possibilities and various possible sentences which the court would impose.

Q Now, you further testified that you were able to communicate with the defendant on May 19, and you were satisfied as to his competency.

A Yes, sir.

Q Would you have any different opinion with respect to May 7?

A What?

Q With respect to the proceedings of May 7?

MR. SILBERT: Objection, Your Honor.

MR. ERILEY: That was the hearing on the motion to suppress.

THE COURT: Sustained.

BY MR. BRILEY:

Q Did you, at any time, following the hearing on the motion to suppress, discuss or explain the merits of a possible appeal to Mr. Hamilton on that specific point, the ruling by Judge Matthews?

A I explained to him that in order to preserve the point as far as an appeal was concerned, he would have to stand trial; that the motion could be renewed at the time of trial; that there was a possibility that the trial judge could overrule the pretrial judge and grant his motion, and if he was convicted and the motion was renewed and the point was properly preserved, he could seek the appellate review.

Q At any point during your representation of Mr. Hamilton on this case, did you formulate your own opinion as to the merits of the motion to suppress?

THE COURT: That has nothing to do with the motion before me.

MR. BRILEY: That is true, Your Honor, but, on occasions --

THE COURT: That has nothing to do with whether I am going to allow him to withdraw his plea of guilty.

This other question you asked him about narcotics that you say is privileged, do I understand that the man is waiving his privilege?

MR. BRILEY: Yes, Your Honor.

THE COURT: Well, what do you want to ask him about -- whether he has been in trouble with narcotics before?

MR. BRILEY: No. Whether or not Mr. Garber knew the background, the narcotics background.

THE COURT: Did you know that he had a narcotics background?

MR. BRILEY: That Mr. Hamilton testified to.

THE WITNESS: Your Honor, I understand the defendant is waiving his privilege?

THE COURT: Right.

THE WITNESS: May I request of the defendant, himself?

THE COURT: Do you understand what the attorney claims as "privilege" means?

THE DEFENDANT: I don't understand what that means.

MR. BRILEY: May I talk to him?

THE COURT: Go ahead.

(Mr. Briley conferred with the defendant out of the hearing of the court reporter.)

MR. BRILEY: If the Court please, I will withdraw that question.

THE COURT: All right. Anything else?

MR. BRILEY: Has Your Honor ruled on the question with respect to Mr. Garber's opinion of the merits of the mo-

tion?

THE COURT: Yes. That has nothing to do with this case.

MR. BRILEY: I have no further questions.

(Witness excused.)

MR. SILBERT: Your Honor, at this time, may I inform the Court that I have here from the D.C. Jail a nurse who has the records from D.C. Jail showing what treatment, if any, this patient received from the period of May 4 through May 19 of last year, that is, from the date he was surrendered by his bondsman to the date on which he entered his plea of guilty.

Now, if counsel will stipulate, I am familiar with the record, and they do show that he received no treatment at all during that period, but they do bear out Dr. Weickhardt's testimony that from January 21 to January 24, 1965, he received treatment for narcotic withdrawal, and they do show after that period, he did receive treatment for such ailments as colds or sore throat.

I think it is relevant, and if he will stipulate to it, fine, and if he doesn't, the witness is here, and I can ask him if he will agree to it which will save Your Honor some time.

MR. BRILEY: If the Court please, I don't see that it is relevant, because the defendant claims and states on his

own testimony that he received no treatment during the fifteen days.

THE COURT: I don't think, personally, it does.

MR. SILBERT: Very well, Your Honor.

THE COURT: Is that all?

MR. BRILEY: I have nothing further.

MR. SILBERT: That is all for the United States, Your Honor.

THE COURT: I will let you know my ruling.

MR. BRILEY: Thank you, Your Honor.

(Whereupon, the hearing on the motion was concluded.)

- - o - -

REPORTER'S CERTIFICATE

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

Official Court Reporter

Bastian, W, 4-2
1/5-
①

BRIEF FOR APPELLANT ROBERT R. HAMILTON

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

ROBERT R. HAMILTON,
Appellant,

v. No. 20,053

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Philip R. Stansbury
701 Union Trust Building
Washington 5, D.C.

Counsel for Appellant
(By Appointment of this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether a hearing on a pretrial motion to suppress evidence is a stage of the trial which requires an accused to be present and competent to stand trial?

2. Whether the District Court in its hearing on appellant's motion to set aside judgment and to vacate sentence pursuant to Title 28, U.S. Code § 2255, erred in its findings that the competency of appellant at the time of his hearing on his pretrial motion to suppress evidence was irrelevant because appellant subsequently entered a plea of guilty?

assuming Hanford was correct,
1) not direct appeal
2) no evidence at time
3) guilty plea

Offense of carrying concealed weapon dismissed so present confinement for carrying a concealed weapon has no relation to this case.

BRIEF FOR APPELLANT ROBERT R. HAMILTON

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ROBERT R. HAMILTON,
Appellant,

v. No. 20,053

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

TABLE OF CITATIONS

---

* Cases principally relied upon

Page

Statutes and Rules

JURISDICTIONAL STATEMENT

On March 8, 1965, appellant was indicted in Criminal Action No. 255-65 on two Counts. Count one was for the purchase of narcotic drugs not in or from the original stamped package within the District of Columbia and Count two was for carrying, within the District of Columbia, a dangerous weapon without a license.

After pleading not guilty to the above charges on March 19, 1965, a hearing on a pretrial motion to suppress evidence was conducted on May 7, 1965 before the Honorable Burnita Shelton Matthews who denied the motion. On May 19, 1965, appellant withdrew his plea of not guilty and entered a plea of guilty to Count one of the indictment before the Honorable Edward M. Curran. The Government withdrew the charges against appellant as to Count two. Appellant was sentenced by Judge Curran on June 18, 1965 to from two to six years for violation of Title 26, U.S. Code § 4704(a) (Harrison Narcotics Act).

On September 7, 1965, appellant filed a motion in forma pauperis to set aside judgment and to vacate

sentence pursuant to Title 28, U.S. Code § 2255. A hearing on the motion was held before Judge Curran on January 28 and February 4, 1966, and an order denying the motion was filed on March 7, 1966.

On March 15, 1966, appellant moved for leave to appeal in forma pauperis and on March 16, 1966, Judge Curran granted appellant's motion and ordered the preparation of the transcript at the Government's expense. The jurisdiction of this Court is based on Title 28, U.S. Code § 1291.

STATEMENT OF THE CASE

The following was contained in the record in this case:

At approximately 10:45 a.m. on Wednesday morning, January 20, 1965, appellant was seated in the front seat on the passenger's side of an automobile parked at a gas station at Adams Mill Road and Lanier Place, N.W., Washington, D.C. There was one other occupant in the back seat of the car. Detective David Paul, Narcotics Squad, Metropolitan Police Department, had received information from an undisclosed source that

appellant had in his possession a quantity of morphine which he had in a blue suitcase in the car. (Pretrial Hearing (May 7, '65) 6). Detective Paul arrived at the aforementioned gas station parking lot at approximately 10:45 a.m. on January 20, 1965. Detective Paul testified that as he approached the parked automobile, appellant took his left hand and placed it behind his back on the front seat. (Pretrial Hearing (May 7, '65) 9, 10). Appellant was then placed under arrest for violation of the Harrison Narcotics Act. (Pretrial Hearing (May 7, '65) 11). Detective Paul then searched the vehicle and testified that he found two white tablets on the front seat where appellant had been seated and then observed a blue suitcase in the back seat of the car. (Pretrial Hearing (May 7, '65) 10). He testified the suitcase was found to contain certain articles of clothing and also a clear plastic vial with nine white tablets inside it. A pair of pants in the suitcase had the name "Hamilton" lettered inside them. (Pretrial Hearing (May 7, '65) 10). Detective Paul also testified that he found some white powder in a cigarette package in appellant's coat pocket. (Pretrial Hearing (May 7, '65) 11).

On March 8, 1965, appellant was indicted for violation of the Harrison Narcotics Act and was released on bail. On May 4, 1965, appellant appeared at the District Court and at the request of his bondsman, was brought before the Honorable George L. Hart, for the purpose of surrendering appellant's bond. Judge Hart placed him in the custody of the U.S. Marshal. Appellant was under the influence of narcotics at the time of the surrender of his bond and had taken approximately six to eight doses of morphine, methadone and cocaine during a twenty-four hour period prior to his appearance in court on May 4, 1965. (Hearing on 2255 Motion (Jan. 28 and Feb. 4, '66) 14, 15). Appellant, as a result of his withdrawal from narcotics, experienced sweating, vomiting, fever, chills and also diarrhea. (Hearing on 2255 Motion (Jan. 28 and Feb. 4, '66) 17). He had been unable to eat anything and when he appeared at the hearing on his motion to suppress evidence before Judge Matthews on May 7, 1965, he had had nothing to eat from the time that his bond was surrendered on May 4, 1965. (Hearing on 2255 Motion (Jan. 28 and Feb. 4, '66) 17). In his testimony on behalf of the

Government, Dr. George Weichkardt, a physician on the staff of St. Elizabeth's Hospital, Washington, D.C., specializing in neurology and psychiatry, stated that in his opinion an individual taking narcotics every six hours would reach the peak of acute withdrawal within two or three days. (Hearing on 2255 Motion (Jan. 28 and Feb. 4, '66) 40). Appellant testified that he had taken from six to eight doses of narcotics during the twenty-four hour period prior to the surrender of his bond on May 4, 1966, and that he was going through the stages of acute withdrawal from narcotics at the time of his pretrial hearing on the motion to suppress evidence held on May 7, 1966. However, the District Court in its Findings of Fact and Conclusions of Law and Order (para. 7) in connection with appellant's motion pursuant to Title 28, U.S. Code § 2255 found such incompetence irrelevant on the ground that appellant subsequently entered a plea of guilty at which time he was competent.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 43:

> PRESENCE OF THE DEFENDANT. The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

STATEMENT OF POINTS

1. A pretrial motion to suppress evidence is a stage of the trial which requires that the accused be present and competent to stand trial. There was testimony at appellant's hearing on his motion to set aside judgment and to vacate sentence to the effect that he was suffering from acute withdrawal from narcotics at the time of his hearing on his motion to suppress. The

symptoms connected with acute withdrawal from narcotics are sufficient to render an accused incompetent to stand trial and therefore unable to assist his counsel. Thus, the pretrial hearing on appellant's motion to suppress was invalid.

2. Appellant's pretrial motion to suppress evidence, held on May 7, 1966, was not only the most decisive stage in his trial but it was the only significant stage. The denial of this motion pursuant to an invalid hearing was sufficient to coerce appellant into withdrawing his plea of not guilty and entering a plea of guilty. It is well established that a coerced plea of guilty is invalid and any conviction pursuant thereto must be set aside. Therefore, the District Court erred in finding that appellant's competence on May 7, 1966, was irrelevant because he subsequently entered a plea of guilty.

SUMMARY OF ARGUMENT

Appellant was indicted for the purchase of narcotic drugs not in or from the original stamped package. A hearing on a pretrial motion to suppress evidence was

conducted and the motion was denied. Appellant then withdrew his plea of not guilty and entered a plea of guilty. At appellant's hearing on his motion pursuant to Title 28, U.S. Code § 2255, the record shows that at the time of his hearing on his motion to suppress evidence appellant was suffering from the symptoms of acute withdrawal from narcotics. The District Court in its hearings on appellant's motion pursuant to Title 28, U.S. Code § 2255 found that the competency of appellant at the time of his hearing on his motion to suppress evidence was irrelevant because appellant subsequently entered a plea of guilty at which time he was competent.

A pretrial motion to suppress evidence is a stage of an accused's trial which requires that he be present and competent to assist his counsel. The symptoms accompanying acute withdrawal from narcotics are such as to render an accused incompetent to stand trial. Thus, it appearing that appellant was not competent to stand trial and assist his counsel at the time of his hearing on his pretrial motion to suppress evidence, such pretrial hearing was invalid.

Concerning appellant's subsequent plea of guilty, it has been recognized that the admission of a confession into evidence may be sufficient in effect to coerce the accused into entering a plea of guilty. It is well established that a coerced plea of guilty is invalid and the conviction pursuant to it must be set aside. In the present case the denial of appellant's motion to suppress evidence was the factor which, in effect, coerced him into entering a plea of guilty.

In the circumstances, appellant respectfully urges that the District Court, in the hearing on his motion pursuant to Title 28, U.S. Code § 2255, erred in finding that appellant's competency at the time of his hearing on his motion to suppress evidence was irrelevant because he subsequently entered a plea of guilty.

ARGUMENT

I

A HEARING ON A PRETRIAL MOTION TO SUPPRESS EVIDENCE IS A STAGE OF THE TRIAL WHICH REQUIRES A DEFENDANT TO BE PRESENT AND COMPETENT TO ASSIST HIS COUNSEL

With respect to this point, appellant desires the Court to read the following pages of the reporter's

transcript of appellant's hearing on his motion to set aside judgment and to vacate sentence:

(1) Hearings (Oct. 29, 1965) 4.

(2) Hearings (Jan. 28 and Feb. 4, 1966) 3, 14-20, 40-45.

(3) Findings of Fact and Conclusions of Law and Order (filed March 7, 1966) para. 7.

Rule 43 of the Federal Rules of Criminal Procedure (18 U.S.C.) provides in part that:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules . . . ."

The Supreme Court in United States v. Hayman, 342 U.S. 205, 223 (1952), held that hearings on post-trial motions require the defendant's presence when "substantial issues of fact as to events in which [he] participated" are involved. In other words, the Supreme Court would consider such a motion as a "stage of the trial" within the meaning of that phrase contained in Rule 43. It necessarily follows that when substantial issues of fact as to events in which the accused

participated are involved in a pre-trial motion, it would be considered a "stage of the trial" and the accused's presence would be required.

In the present case, the hearing on the motion to suppress evidence involved testimony in regard to events leading to the arrest of the appellant and the subsequent seizure by the arresting officer of certain incriminating evidence. No one could contest that appellant did not "participate" in these events. Further, the hearing involved "substantial issues of fact" as to the circumstances leading to the arrest and the seizure of the evidence. Such circumstances were crucial in determining whether or not an illegal search and seizure took place. Therefore, based on the Supreme Court's decision in United States v. Hayman, supra, the hearing on appellant's motion to suppress evidence was a "stage of the trial" requiring his presence.

It is well established that the constitutional guarantee of due process of law prohibits an accused person from standing trial while he is legally incompetent. See, Pate v. Robinson, 383 U.S. 375 (1966); Hansford v. United States, #19,436, D.C. Cir., July 6, 1966.

The fact that appellant's incompetency to stand trial was not disclosed at his pretrial motion to suppress evidence does not prohibit him from raising the question on a motion pursuant to Title 28, U.S. Code § 2255. See, Seidner v. United States, 104 U.S. App. D.C. 214, 260 F.2d 732 (1958); United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964).

In the present case, there is uncontradicted testimony in the transcript of the record in appellant's motion to set aside judgment and vacate sentence that he was going through acute stages of withdrawal from narcotics at the time of his hearing on his motion to suppress evidence.

The test as to whether an accused is competent to stand trial has been stated by the Supreme Court in Dusky v. United States, 362 U.S. 402 (1960), to be:

> "Whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402.

In Hansford v. United States, supra, one of the questions confronting this Court was whether the symptoms accompanying withdrawal from narcotics were

sufficient to render the accused incompetent to stand trial. In holding that such symptoms could very well render an accused incompetent to stand trial, this Court stated at pages 6 and 7:

> "Withdrawal is a recognized medical illness. Its effects typically include various physical reactions such as perspiration, waves of gooseflesh, muscle twitch, body aches, hot and cold flashes, restlessness, sleeplessness, nausea, vomiting, and diarrhea. The subject is in extreme physical misery. He may try to withdraw within himself, or may exhibit highly individualized patterns of anxious and irrational behavior, such as becoming quite antagonistic, threatening suicide, assuming bizarre postures, or exaggerating his distress in dramatic ways, often as a purposive attempt to obtain drugs. These physical and psychological symptoms of withdrawal could very well render a defendant incompetent to stand trial. He may be physically incapacitated from following the evidence or from discussing it with counsel, or he may be so preoccupied with his real or imagined suffering as to lose all interest in his case and desire only that it end as quickly as possible. Inquiry and a determination that the defendant is in fact competent therefore seems a prerequisite to the conduct or continuation of a fair trial."

Based on the above quoted language in Hansford v. United States, supra, it is clear that symptoms accompanying acute withdrawal from narcotics could have rendered

appellant incompetent at the time of his pretrial motion to suppress evidence and therefore incompetent to stand trial. This being the case, the hearing on the pretrial motion would of necessity be invalid.

II

THE DISTRICT COURT ERRED IN ITS FINDINGS THAT THE COMPETENCY OF APPELLANT AT THE TIME OF HIS HEARING ON HIS PRETRIAL MOTION TO SUPPRESS EVIDENCE WAS IRRELEVANT BECAUSE HE SUBSEQUENTLY ENTERED A PLEA OF GUILTY

The District Court in its findings on appellant's motion pursuant to Title 28, U.S. Code § 2255 concluded that the question of appellant's competency at the time of his hearing on his motion to suppress evidence was irrelevant because he subsequently entered a plea of guilty.

In Thomas v. United States, 122 U.S. App. D.C. 225, 352 F.2d 701 (1965), in his motion pursuant to Title 28, U.S. Code § 2255, the appellant in that case alleged that his convictions were based on an alleged coerced confession. The Court held that appellant's claim would have to be adjudicated on its merits. In one of these convictions appellant entered a plea of guilty to the offense. In regard to the effect of the alleged coerced

confession on appellant's plea of guilty, Judge Washington, in his concurring opinion, stated as follows:

> "The special circumstances in the instant case, however, might warrant the judge in concluding that the guilty plea was induced by the alleged coerced confession. Appellant had just been convicted after trial of two other offenses, with the help of the confessions. It is distinctly possible that the confession played a controlling part in his decision to plead guilty. If that proves to be the case, it is possible that that conviction should be set aside, too." 352 F.2d at 705.

Similarly, in United States Ex Rel. Jose Cuevas v. Rundle, # M-3039, U.S. Dis. Ct. E. D. Pa., Sept. 19, 1966, involving a writ of habeas corpus, the petitioner alleged inter alia that a confession obtained by the police was involuntary and that he entered a plea of guilty as a direct consequence of the existence of the confession. In holding that the guilty plea was given in reliance on a constitutionally invalid confession, the court stated at page 24:

> "A case such as this illustrates that an illegally obtained statement can be just as damaging where its existence leads the defendant to plead guilty, as in those situations where it is introduced into evidence after a plea of not guilty."

It is well established that a coerced plea of guilty is invalid and a conviction pursuant thereto must be set aside. Machibroda v. United States, 368 U.S. 487 (1962).

Judge Washington in Thomas v. United States, supra, and the court in United States Ex Rel. Jose Cuevas v. Rundle, supra, recognized that the admission of a coerced confession into evidence could be sufficient in effect to coerce an accused into entering a plea of guilty. It would seem clear that a denial to suppress evidence, based on an invalid hearing where such evidence is so incriminating that it would be virtually impossible to obtain an acquital, would also be sufficient in effect to coerce an accused into pleading guilty.

In the present case, it appears that appellant was suffering from symptoms of acute withdrawal from narcotics at the time of his hearing on his motion to suppress evidence and therefore, was incompetent to stand trial and assist his counsel. An essential element was missing from this stage of appellant's trial; namely, his competency to stand trial. Thus, the pretrial hearing was invalid. Yet, the result of this invalid pretrial

hearing in effect coerced appellant into entering a plea of guilty. Although it cannot be definitely determined at this time, appellant's incompetency at the time of his hearing on his motion to suppress evidence may have been the controlling factor in the denial of his motion.

In view of the opinion of Judge Washington in the Thomas case and also the court's decision in United States Ex Rel. Jose Cuevas v. Rundle, supra, appellant respectfully urges that the District Court erred in its findings that appellant's competency at the time of his pretrial motion to suppress evidence was irrelevant because he subsequently entered a plea of guilty.

DISPOSITION ON REMAND

This Court in the Hansford case held that in circumstances almost identical to the present case, the only appropriate remedy was a new trial. In supporting this conclusion the Court stated at pages 10 and 11:

> "A retrospective determination of competency is difficult at best. It is virtually impossible where, as here, there is no contemporaneous testimony or evidence of appellant's competence at the time of trial and where his present condition -- incarcerated and

> presumably no longer under the influence of narcotics or suffering from withdrawal -- is unquestionably different. An expert who now examined him could do no more than speculate unduly about his mental condition at his trial a year ago."

Although the Hansford case involved a direct appeal, it would seem that the rationalization of the Court which is quoted above would also apply to the present case. Therefore, appellant respectfully urges that this Court set aside his judgment of conviction and vacate his sentence.

If this Court is of the opinion that the setting aside of the judgment of conviction and the vacating of the sentence is not the proper remedy in this case, appellant respectfully urges, in the alternative, that the denial by the District Court of his motion pursuant to Title 18, U.S. Code § 2255 be reversed and the case remanded to that Court with instructions to conduct hearings as to the competency of the appellant on the date of the hearing on his pretrial motion to suppress evidence.

Respectfully submitted,

/s/ Philip R. Stansbury

Philip R. Stansbury
701 Union Trust Building
Washington, D.C. 20005

Counsel for Appellant
(By Appointment of this Court)

Boston, W. Mass
1/5-
6

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20053

ROBERT R. HAMILTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
EARL J. SILBERT,
Assistant United States Attorneys.
LEE A. FREEMAN, Jr.,
Special Attorney, U.S. Attorney's Office.

C.A. No. 2154-65.

QUESTIONS PRESENTED

Appellee believes that the following questions are presented:

(1) Whether collateral attack upon appellant's conviction and sentence may be entertained when he is confined under an identical concurrent sentence for a separate crime, and no objection is made to the latter sentence?

(2) Whether appellant's guilty plea precludes him from raising his alleged incompetence during the pre-trial evidentiary hearing as a ground for collateral relief?

(3) Whether appellant's mental incompetence during the pre-trial hearing, even if proven, would constitute an error serious enough to justify collateral relief?

239-869 -- 66 — 1

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20053

ROBERT R. HAMILTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The circumstances relating to this appeal date from November 28, 1964, when appellant was arrested for carrying a concealed weapon. Approximately two months later, he was arrested for illegally purchasing narcotics, as well as carrying another dangerous weapon. The record discloses that the following events gave rise to his arrest for the latter offenses: At 10:30 a.m. on January 20, 1965, Detective David Paul received information from a previously reliable informant that appellant, together with one Donald Smith, was seated in a 1962 green and white Oldsmobile with Maryland tags FY 1231; that the car was parked in a gas station at Lanier Place and Adams Mill Road, N.W.; that appellant had a quantity of morphine in a blue suitcase inside the automobile; and that appellant also possessed a loaded gun. Both appellant and Smith were known to Detective Paul as users of narcotics. About 10:45 a.m. Detectives Paul and Brewer arrived at the gas station and observed the automobile as described by the

informant. When they approached the car and identified themselves, Detective Paul saw appellant place his left hand behind his back. Appellant was thereupon arrested. As he left the car, Detective Paul observed two white tablets lying on the seat where appellant had been sitting, a brown briefcase next to them, and a blue suitcase on the rear seat. A search revealed that there were nine white tablets and narcotics paraphernalia in the suitcase, a .22 caliber revolver and ammunition in the briefcase, and more bullets and white powder on appellant's person (MS Tr. 3–17).[1]

On February 23, 1965, appellant was indicted under 22 D.C. Code § 3204 (1961) for carrying a concealed weapon. (Criminal Case No. 173–65.) The next month, March 8, 1965, the grand jury returned a separate indictment charging him, *inter alia*, with the purchase of narcotics in violation of 26 U.S.C. § 4704 (a). (Criminal Case No. 255–65.) Appellant pleaded guilty to both offenses on May 19, 1965, and received concurrent two-to-six years sentences for each crime. Pursuant to 28 U.S.C. § 2255, appellant then moved to set aside the judgments and vacate his sentences. As grounds for relief he alleged that he was mentally incompetent at the time his pre-trial motion to suppress evidence was heard and denied by Judge Burnita S. Matthews, and that his guilty plea resulted from the ineffective assistance of his retained counsel. After hearings upon this § 2255 motion, Judge Edward M. Curran made these findings of fact:

> "6. The evidence shows that petitioner, at the time he entered his pleas of guilty on May 19, 1965, understood the nature of the offenses with which he was charged, was able to properly assist counsel in regard to these offenses, and entered his pleas voluntarily.
>
> "7. Though petitioner alleges that he was under the influence of narcotics on May 4, 1965, this allegation, even if true, and even if he did undergo subsequent withdrawals, did not affect the voluntariness of the pleas

[1] References to the transcript of the hearing on the motion to suppress are designated by "MS Tr.", the § 2255 hearing by "MR Tr.", and the proceeding at which appellant pleaded guilty by "Tr.".

of guilty or the understanding with which the pleas were entered on May 19, 1965.

"8. The pleas of guilty entered by petitioner were not induced by promises of his retained counsel.

"9. Petitioner's retained counsel made no promises to petitioner concerning the sentences to be imposed."

In denying the motion, the court concluded as a matter of law that:

"2. Petitioner was competent when he entered his plea of guilty.

"3. The pleas of petitioner in Criminal Cases Nos. 173–65 and 255–65 were entered voluntarily and with understanding.

"4. The voluntariness and understanding of petitioner's pleas were in no way affected by alleged ineffective assistance of petitioner's retained counsel.

"5. Petitioner received effective assistance of counsel."

Appellant now seeks review of the denial of relief only with respect to Criminal Case No. 255–65, and focuses his attack solely upon his alleged incompetence during the pre-trial evidentiary hearing. Hence, appellant's contentions are completely irrelevant to the judgment and sentence imposed in Criminal Case No. 173–65, for that offense occurred at a different time than the narcotics violation and involved no question of illegal search and seizure.

STATUTE INVOLVED

Title 28, United States Code, § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress *claiming the right to be released* upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which

imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. [Emphasis added.]

SUMMARY OF ARGUMENT

Appellant's confinement under an identical concurrent sentence for a different crime forecloses all avenues of collateral attack upon the conviction to which he now objects. A motion under 28 U.S.C. § 2255 is clearly not available, and, taking into consideration appellant's present situation, there is no reason that the extraordinary remedy of *coram nobis* should be involved.

After pleading guilty in open court with advice of counsel, appellant cannot be heard to challenge his conviction and sentence on the ground that he was incompetent during the pre-trial hearing on his motion to suppress evidence. In order to avoid application of the doctrine that a guilty plea waives non-jurisdictional objections to the prior proceedings, appellant asserts that his plea should be vacated as involuntary, having been induced by the adverse ruling in the defective pre-trial hearing. But it has long been recognized that, as a

matter of law, such circumstances do not vitiate a guilty plea, even if they can be shown to have contributed to the accused's decision to plead guilty. Moreover, there is no factual basis for appellant's suggestion that the refusal to exclude evidence caused his plea.

Assuming that appellant can raise the issue, his alleged incompetence at the pre-trial hearing does not amount to an error which justifies relief under *coram nobis*, for appellant's participation was not necessary to resolve the legal questions as to the admissibility of evidence.

ARGUMENT

I. Having received an identical concurrent sentence on another offense, appellant cannot request collateral relief from his conviction for illegal purchase of narcotics

At the outset, it is submitted that appellant cannot use 28 U.S.C. § 2255 to attack the sentence for narcotics violation since, regardless of the decision on that matter, he must still serve a valid concurrent sentence of the same length upon his guilty plea to carrying a concealed weapon. See *Heflin* v. *United States*, 358 U.S. 415, 418 (1959).[2] Just as relief could not be obtained by the habeas corpus route, *McNally* v. *Hill*, 293 U.S. 131 (1934), "section 2255 is available only to a prisoner claiming the right to immediate release if the issues are determined in his favor." *United States* v. *McGann*, 245 F. 2d 670, 672 (2d Cir. 1957). See *Daniel* v. *United States*, 107 U.S. App. D.C. 110, 274 F. 2d 768 (1960).

Nor may appellant's motion properly be entertained as a request for relief in the nature of *coram nobis*. This is "an extraordinary remedy" which "should be allowed only under circumstances compelling such action to achieve justice." *Young* v. *United States*, 337 F. 2d 753, 756 (5th Cir. 1964). While this Court has permitted collateral attack denominated as *coram nobis* upon sentences already served or not yet commenced, those decisions rested upon "compelling" reasons which are not

[2] In a concurring opinion five Justices expressed their agreement with the unanimous decisions of the lower courts that "a motion under § 2255 may be filed only by a prisoner claiming the right to be released." 358 U.S. at 421.

pertinent to a situation in which only one of identical concurrent sentences is challenged.

This Court has recently held that "where a practical effect on a present sentence may result from a successful attack on a conviction and sentence already served, the proper remedy is a writ in the nature of *coram nobis.*" *Clifton* v. *United States,* D.C. Cir. No. 19,757, decided November 15, 1966, slip op. at 2, n. 2. In that case, appellant's current sentence under a multiple offender statute depended upon the validity of the prior conviction which he sought to attack collaterally, and so his action was admittedly not rendered moot by service of the previous sentence. But here appellant's challenge to his narcotics conviction can have no conceivable present effect upon his sentence for carrying a concealed weapon.

This Court has also stated that "*coram nobis* can for appropriate reasons be invoked to review a sentence which petitioner has not yet started to serve." *Moon* v. *United States,* 106 U.S. App. D.C. 301, 302, 272 F. 2d 530, 531 (1959). Where such relief was granted, however, the prisoner faced the problem that evidence necessary to upset a subsequent consecutive sentence might disappear before his previous sentence ended. For instance, in *Thomas* v. *United States,* 106 U.S. App. D.C. 234, 271 F. 2d 500 (1959), this Court remanded the case for consideration of appellant's contentions that his guilty plea had been coerced by a beating which required his hospitalization for 10 days, noting that if appellant were "obliged to wait 15 or 20 years to prove the alleged coercion the nurses and doctors may not be available or their memories may fade." 106 U.S. App. D.C. at 236, 271 F. 2d at 502, n. 4. The same rationale underlies the decision in *Johnson* v. *United States,* 344 F. 2d 401 (5th Cir. 1965). There appellant's allegations raised doubts as to his mental competence in connection with two convictions, for which he had received consecutive sentences. The court allowed collateral attack upon both convictions, because it felt that to put off consideration of appellant's mental competence with respect to the latter one until he commenced serving that sentence would "certainly frustrate, if not foreclose forever, any intelligent answer to these related questions which depend so much on evanescent psychiatric data and opinions." 344

F. 2d at 411. Such concern would clearly be misplaced in the present case for whether or not appellant can convince the district court to ignore his guilty plea as the product of alleged mental incompetence at the pre-trial hearing on the motion to suppress, he will remain confined under the valid sentence for carrying a concealed weapon. Since appellant's motion can produce no immediate relief whatever, this case involves none of the elements of possible unfairness or prejudice which might justify invoking the extraordinary writ of *coram nobis*.[3]

II. Since appellant voluntarily and understandingly pleaded guilty to the illegal purchase of narcotics, his alleged mental incompetence during the pre-trial hearing on his motion to suppress evidence does not constitute a ground for collateral relief

(MR Tr. 10, 26, 55; Tr. 2–4)

Appellant contends that his sentence, imposed after a guilty plea, should be vacated because he was allegedly going through withdrawal from narcotics during the pre-trial hearing on his motion to suppress evidence. Putting to one side for a moment the question whether that hearing was consequently defective, appellee submits that the contentions raised on this appeal are not properly cognizable under 28 U.S.C. § 2255, or *coram nobis*. Of course, no one can quarrel with the general principles that a guilty plea is void "if induced by promises or threats which deprive it of the character of a voluntary act," *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962), or made when accused was incompetent. *Seidner* v. *United States*, 104 U.S. App. D.C. 367, 260 F. 2d 732 (1958). Appellant, though, has no legal or factual basis for invoking these principles.

A guilty plea ordinarily precludes collateral attack upon everything except jurisdictional defects. *United States ex rel.*

[3] Appellee is not unmindful of this Court's decision that an appeal is not mooted by completion of the sentence since a felony conviction "deprives a person of specific civil rights in the District of Columbia, 1 D.C. Code § 1102 (2) (c), and affects the punishment should he entail another felony conviction. 22 D.C. Code § 104." *Dancy* v. *United States*, — U.S. App. D.C. —, 361 F. 2d 75, 79 (1966). However appropriate these considerations may be with respect to direct appeals, appellee submits that they should not be extended into the area of collateral attack.

Glenn v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied*, 383 U.S. 915 (1966). Having pleaded guilty, appellant "cannot now collaterally attack that plea by claiming irregularities preceding it." *Farrar* v. *United States*, 346 F. 2d 375, 376 (7th Cir. 1965). In effect, his guilty plea waived any objections he might have raised as to the conduct of the pre-trial suppression hearing. The cases are both numerous and consonant on this point. For example, it has been held that a voluntary guilty plea forecloses collateral attack upon illegal search and seizure, *Sweptson* v. *United States*, 289 F. 2d 166 (9th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962), upon illegal arrest and interrogation, *Davis* v. *United States*, 347 F. 2d 374 (9th Cir. 1965), and upon illegally obtained confessions, *Busby* v. *Holman*, 356 F. 2d 75 (5th Cir. 1966); *Sullivan* v. *United States*, 315 F. 2d 304 (10th Cir.), *cert. denied*, 375 U.S. 910 (1963); *Smith* v. *United States*, 347 F. 2d 505 (7th Cir. 1965). This unbroken line of decisions indicates that the conduct of the pre-trial hearing on the motion to suppress is not a proper concern in this collateral proceeding unless the alleged impropriety can be said to have debased the intelligent and voluntary nature of appellant's guilty plea. *Hurst* v. *United States*, 180 F. 2d 835 (10th Cir. 1950). In this respect, appellant does suggest that the unfavorable ruling on the motion to suppress prompted his guilty plea. But the attempt to label his guilty plea involuntary simply on this account ignores all relevant precedent. The Fifth Circuit rejected an almost identical contention in *Alexander* v. *United States*, 290 F. 2d 252, *cert. denied*, 368 U.S. 891 (1961). There the appellant sought to have his guilty plea set aside for the reason that it resulted from the ineffective assistance of counsel. He alleged his attorney told him "that, having lost on his motion to suppress, he had no chance for an acquittal by the jury and that a plea of guilty would leave the court with 'a better taste in its mouth.'" Despite the fact that counsel gave this advice upon the erroneous belief there were no legal bases for arguing that the evidence should have been excluded, the Court of Appeals held that appellant could not use 28 U.S.C. § 2255 to complain about what might have thus indirectly influenced his guilty plea; rather, the change of pleas

was viewed simply as part of trial strategy. Similarly, in the present case, appellant remained free "to plead not guilty and take the risks or benefits which flow from that choice." *Watts* v. *United States*, 107 U.S. App. D.C. 367, 370, 278 F. 2d 247, 250 (1960). Another decision to this effect is *Foster* v. *United States*, 359 F. 2d 497 (8th Cir. 1966), where the court refused to go behind a guilty plea allegedly entered only after the accused realized that his attorney was not going to move to suppress inadmissible confessions.

Nor can it be seriously contended that appellant's failure to have evidence suppressed vitiated the understanding with which he made his guilty plea.[4] For authority to the contrary one need only look to *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707, *cert. denied*, 358 U.S. 847 (1958), in which this Court upheld the validity of a guilty plea against the allegation that it was caused by counsel's failure to inform accused that he could move to exclude certain evidence and confessions. The language of that opinion is pertinent to the analogous issue posed by appellant:

> "[W]e think 'understandingly' refers merely to the *meaning* of the charge, and what acts amount to being *guilty* of the charge, and the *consequences* of pleading guilty thereto, rather than to dilatory or evidentiary defenses. * * * Appellant does not try to say he did not do the act charged. He pleads only that, unknown to him, he might have been able to suppress the truth as to certain evidence of his crime, and thus, perhaps defeat justice. He cannot be heard to this end after a voluntary, knowing plea of guilty." 103 U.S. App. D.C. at 155, 256 F. 2d at 710.

These decisions illustrate that courts consistently refuse to listen to collateral attack upon guilty pleas by individuals who simply assert that their pleas were motivated by judicial rulings or failings of their own counsel which lessened their chances of success at trial.

---

[4] At the § 2255 hearing appellant stated that he "didn't pay that much attention" to the questions asked him by the court when he pleaded guilty (MR Tr. 26).

As support for his theory, appellant points to Judge Washington's concurrence in *Thomas* v. *United States*, 122 U.S. App. D.C. 225, 352 F. 2d 701 (1965). But the speculation in that opinion as to the influence of the accused's confession upon his guilty plea cannot be applied beyond the peculiar circumstance to which it relates, *i.e.*, that accused "had just been convicted after trial of two other offenses, with the help of the confessions." [5] Any other reading of Judge Washington's remarks would squarely conflict with the established law in this jurisdiction that an inadmissible confession does not in itself subject a sentence based upon a guilty plea to collateral attack, *e.g.*, *Newman* v. *United States*, 87 U.S. App. D.C. 419, 184 F. 2d 275 (1950), *cert. denied*, 340 U.S. 921 (1951). See also *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7th Cir. 1964) (specific allegation that guilty plea induced by illegally obtained confession). And in a comparable situation, this Court has observed:

> "[T]he mere fact that the plea has resulted from police procedures such as making known the admissions of a confederate does not, standing alone, render a plea involuntary and susceptible to collateral attack." *Watts* v. *United States*, 107 U.S. App. D.C. at 369, 278 F. 2d at 249 (1960).

In addition, the greater potential effect of a coerced confession upon a subsequent guilty plea distinguishes such cases from the present one.[6] An adverse ruling on a motion to suppress can hardly be deemed "coercive" in the sense required to set aside a guilty plea in view of decisions which hold that a guilty plea cannot be collaterally attacked as having been induced by an illegal search and seizure, *e.g.*, *Gawantka* v. *United States*,

---

[5] It should further be noted that even were the guilty plea found infected by the confession, Judge Washington only mentions setting aside the conviction as a "possibility."

[6] Besides being out of step with the overwhelming weight of authority, *United States ex rel. Cuevas* v. *Rundle*, Misc. No. M-3039, D.C. Pa., decided September 19, 1966, rests upon the judge's explicit finding that under its unique circumstances relator's guilty plea was caused by the existence of an illegally obtained confession, and so "was not truly voluntary." At 18 and 24.

327 F. 2d 129 (3d Cir.), *cert. denied*, 377 U.S. 969 (1964), and that the erroneous admission of evidence obtained by "an unconstitutional search or seizure is not properly the ground of a collateral attack * * *." *Thornton* v. *United States*, D.C. Cir. No. 19,644, decided October 6, 1966, slip op. at 2.

In any event, there is simply no support in the record for appellant's intimation that the failure to have evidence suppressed induced his guilty plea. Indeed, it is refuted by his own testimony at the § 2255 hearing. There, in response to questions from the court, appellant asserted that he pleaded guilty at the insistence of counsel,[7] after counsel had "promised" him that he would "not get much time" and would be sent to an institution at Lexington, Kentucky, where treatment for drug addiction was available (MR Tr. 9–12, 21). At the end of direct examination, appellant stated that the "primary reason" he pleaded guilty was "to receive treatment" (MR Tr. 22). The fact that appellant pleaded guilty to an unrelated offense on May 19, 1965, further belies the argument that his plea was due to the court's refusal to suppress evidence. As brought out in the § 2255 hearing, appellant was aware that he could renew the motion to suppress at trial, or argue its denial as a basis for reversal on appeal.[8] *Cf. Griffin* v. *United States*, 103 U.S. App. D.C. 317, 258 F. 2d 411, *cert. denied*, 357 U.S. 922 (1958). Finally, when appellant appeared before Judge Curran on May 19, 1965, the court took extreme care to ascertain whether appellant understood the consequences of pleading guilty and whether he entered his pleas voluntarily.[9]

---

[7] Appellant testified that his attorney "asked me if I would plead guilty before you. He told me that you didn't want to try the case and you would accept my guilty plea. I told him I didn't want to plead guilty because I felt that I would get too much time. He told me you were a fair judge and he had talked to you, and he didn't think I would get much time and to plead guilty" (MR Tr. 10).

[8] Appellant's counsel "explained to him that in order to preserve the point as far as an appeal was concerned, he would have to stand trial; that the motion could be renewed at the time of trial; that there was a possibility that the trial judge could overrule the pretrial judge and grant his motion, and if he was convicted and the motion was renewed and the point was properly preserved, he could seek the appellate review" (MR Tr. 55).

[9] Transcript is as follows:

"The DEPUTY CLERK. Robert R. Hamilton, have you been advised and

In sum, neither legal precedent nor the facts on record furnish any reason to disturb the determination that appellant entered his guilty plea "voluntarily and with understanding," or the lower court's consequent denial of relief.

---

do you understand that in each of these cases that you have the right to have a speedy trial by jury with the aid of counsel?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. Do you understand that you will have no such right if your plea of guilty is accepted?

"The DEFENDANT. Yes, sir, I do.

"The DEPUTY CLERK. Do you understand that you will have the assistance of counsel at the time of sentence if your plea of guilty is accepted?

"The DEFENDANT. Yes, sir.

"THE DEPUTY CLERK. Do you understand that in Criminal Case Number 255–65 that you are pleading guilty to Count 1 of the indictment which charges that you purchased a narcotic drug not in or from the original stamped package, and did you commit that crime?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. And do you understand that in Criminal Case Number 173–65 that you are charged with carrying a dangerous weapon and that you are pleading guilty to same, and did you commit that crime?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. Has your plea of guilty been induced by any promise by anyone as to what sentence will be imposed by the Court?

"The DEFENDANT. No, sir, they have not.

"The DEPUTY CLERK. Have you been threatened or coerced by anyone into entering a plea of guilty?

"The DEFENDANT. No, sir.

"The DEPUTY CLERK. Have any promises of any kind been made to you by anyone to induce a plea of guilty?

"The DEFENDANT. No, sir.

"The DEPUTY CLERK. Do you understand the consequences of entering a plea of guilty?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. Are you entering a plea of guilty voluntarily and of your own free will because you are guilty and for no other reason?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. Have you discussed your plea fully with your attorney?

"The DEFENDANT. Yes, sir.

"The DEPUTY CLERK. Are you completely satisfied with the services of your attorney?

"The DEFENDANT. Yes, sir." (Tr. 2–4.)

III. In any event, appellant's substantive contentions do not warrant collateral relief by way of coram nobis

(MS Tr. 12, 21–25)

Even assuming that appellant can seek a writ of *coram nobis* despite his lawful confinement on an identical concurrent sentence, and that he can question the propriety of the pre-trial suppression hearing despite his subsequent guilty plea, his arguments hardly call for the extraordinary remedy of *coram nobis*. Such relief can be granted only to correct errors "of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer*, 235 U.S. 55, 69 (1914). Appellant directs his attack not at the proceeding where he entered his guilty pleas but rather the pre-trial hearing on his motion to suppress. The question whether withdrawal from narcotics rendered appellant mentally incompetent during the pre-trial hearing becomes academic in view of the fact that his participation was not necessary to the resolution of the legal issues involved at that juncture. Appellant's attorney vigorously questioned the arresting officer, Detective Paul, who readily admitted that the arrest occurred before any search and seizure; and further testified that he made the arrest because he believed appellant was committing an offense at the time, a belief based on information received from a reliable informant, the detective's personal knowledge of appellant, and the observation that appellant put his hand behind his back as the detective approached (MS Tr. 12). Counsel then argued that there was no probable cause for an arrest without a warrant because the government had not established the reliability of its informant—an argument undercut by *Draper* v. *United States*, 358 U.S. 307 (1959)—and that the seized evidence could not be introduced unless the identity of the informant were disclosed (MS Tr. 21–25). Judge Matthews correctly rejected these arguments in denying the motion to suppress. The record thus demonstrates that appellant's testimony or recollection could have had no relevance whatsoever: there were no dis-

puted issues of fact bearing upon probable cause for arrest,[10] and appellant's counsel raised every imaginable objection to the search and seizure. In these circumstances, appellant's alleged incompetence during the pre-trial hearing did not matter in the least. For this reason, as well as the highly conjectural and tenuous effect of the court's refusal to exclude evidence upon appellant's later guilty pleas, appellant should not be able to invoke *coram nobis*.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
EARL J. SILBERT,
Assistant United States Attorneys.
LEE A. FREEMAN, JR.,
Special Attorney, U.S. Attorney's Office.

[10] A denial by appellant that the seized items belonged to him would go to their probative weight as evidence. It might be argued that counsel's objections to the government's manner of showing the informant's reliability posed a factual issue as to reliability itself. But certainly appellant could have contributed nothing to an inquiry along this line.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Boston, Mass. 2
1/5-
①

REPLY BRIEF FOR APPELLANT ROBERT R. HAMILTON

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ROBERT R. HAMILTON,
Appellant,

v. No. 20,053

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Philip R. Stansbury
701 Union Trust Building
Washington, D.C. 20005

Counsel for Appellant
(By Appointment of this
Court)

REPLY BRIEF FOR APPELLANT ROBERT R. HAMILTON

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ROBERT R. HAMILTON,
Appellant,

v. No. 20,053

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TABLE OF CITATIONS

---

* Cases principally relied upon

REPLY BRIEF FOR APPELLANT

The Government contends that because the appellant is serving identical concurrent sentences for a crime unrelated to this appeal, all avenues of collateral attack upon his conviction for violation of 26 U.S.C. § 4704 (the Harrison Narcotics Act) are foreclosed to him. This contention is based on the argument that a motion pursuant to 28 U.S.C. § 2255 is not available and that relief in the nature of coram nobis should not be obtainable.

In support of its argument that a motion pursuant to 28 U.S.C. § 2255 is not available to the appellant, the Government relies primarily on the Supreme Court's decision in Heflin v. United States, 358 U.S. 415 (1959), in which the petitioner had been convicted under three counts charging violations of the Federal Bank Robbery Act. One count charged taking property by force and violence; the second count charged receipt of stolen money; and the third count charged conspiracy. The petitioner received a sentence for ten years on the first count, three years on the conspiracy count and one and a half years on the count

charging receipt of stolen property. All sentences were to run consecutively. The first sentence to be served was the ten years received on the first count. The petitioner did not contest the validity of that conviction.

Mr. Justice Douglas, who delivered the opinion of the Court, made the following comments in connection with the availability of § 2255:

> "A majority [of the Court] . . . are of the view, shared by several Courts of Appeals, that § 2255 is available only to attack a sentence under which a prisoner is in custody." (emphasis added) 358 U.S. at 418.

It seems clear that the test laid down by the majority of the Court was that § 2255 was available to attack a sentence under which a prisoner is in custody. There was no indication from the majority opinion that the petitioner had to also claim the right to immediate release as is contended by the Government.

The Government cites Daniel v. United States, 107 U.S. App. D.C. 110, 274 F.2d 768 (1960), in support of its contention that the appellant must claim the right to immediate release. The Daniel case, like Heflin, involved consecutive rather than concurrent

sentences. The only case cited by the Government which involved concurrent sentences was United States v. McGann, 245 F.2d 670 (2d Cir. 1957). McGann was decided before the Supreme Court's decision in Heflin and it is submitted that this Court should not follow it.

The Government's contention that a petitioner must claim a "right to immediate release" before § 2255 is available to him if it was carried to its ultimate conclusion would prohibit any prisoner who is subject to retaking as a parole violator pursuant to 18 U.S.C. § 4205 from filing such a motion. Although such a prisoner would have a right to be released from custody under his conviction from which he is petitioning, he would not have a right to immediate release from custody because, as a parole violator, he would be detained by prison authorities until a warrant had been issued. Thus the practical effect would be that he would not be released from custody. 1/

1/ In this connection it should be noted that even though an individual who had been on parole was acquitted of the charges against him he still can be retaken as a parole violator pursuant to 18 U.S.C. § 4205. See Fox v. Sanford, 123 F.2d 334 (5th Cir. 1941); Mills v. Hiatt, 50 F. Supp. 689 (M.D. Pa. 1943).

Appellant contends that a motion pursuant to 28 U.S.C. § 2255 is available to him; however, if this Court decides that the principal test for availability under § 2255 is that petitioner must claim the right to immediate release, the appellant contends that this Court should entertain appellant's motion as a request for relief in the nature of coram nobis.

Apparently, the Government recognizes that where a motion pursuant to 28 U.S.C. § 2255 is not available to a petitioner, the court may recognize his petition as a request for relief in the nature of coram nobis. See United States v. Morgan, 346 U.S. 502 (1954); Moon v. United States, 106 U.S. App. D.C. 301, 272 F.2d 530 (1959); Pledger v. United States, 272 F.2d 69 (4th Cir. 1959); Clifton v. United States, D.C. Cir. No. 19,757, decided November 15, 1966, slip op. at 2, n.2. The fact that in this case appellant is appealing a decision on a motion pursuant to 28 U.S.C. § 2255 would not prohibit this Court from granting relief by treating appellant's motion as a request for relief in the nature of coram nobis.

Moon v. United States, supra; Pledger v. United States, supra.

It appears that the basis for the Government's contention that coram nobis is unavailable is that appellant's challenge to his narcotics conviction can have no conceivable present effect upon his sentence for carrying a concealed weapon. On the contrary, it is only reasonable to assume that the possibility of appellant's parole would be affected if he were only serving a sentence for one conviction rather than concurrent sentences for two convictions. Thus, the length of time appellant serves in prison under his conviction for carrying a concealed weapon could be affected if his narcotics conviction were set aside.

Further, if after appellant's release he is subsequently convicted for violation of 26 U.S.C. § 4704 (the Harrison Narcotics Act) he would be subject, as a second offender, to a mandatory sentence of not less than five years nor more than 20 years pursuant to 26 U.S.C. § 7237. Thus, appellant's present narcotics conviction would have a profound effect on any subsequent conviction for violation of the Narcotics Act.

This Court in Dancy v. United States, ___ U.S. App. D.C. ___, 361 F.2d 75, 79 (1966), permitted the appellant to appeal from a conviction even though he had already served his sentence and notwithstanding the fact that the setting aside of that conviction would not result in his immediate release. In holding that the case was not moot the Court stated:

> "The crime of which he was convicted, . . . is a felony. Such a conviction deprives a person of specific civil rights in the District of Columbia, . . . and affects the punishment should he entail another felony conviction." 361 F.2d at 79.

The fact that Dancy involved an appeal rather than collateral attack should not be regarded as significant. There seems to be no apparent reason why this Court would not have granted the same relief had the appellant in Dancy collaterally attacked his conviction pursuant to a writ of error coram nobis.

CONCLUSION

Appellant respectfully submits that a motion pursuant to 28 U.S.C. § 2255 is available to the appellant and that if this Court should determine that such a motion is not available to the appellant, appellant submits that his motion may properly be entertained by this Court as a request for relief in the nature of coram nobis.

Respectfully submitted,

Philip R. Stansbury